88-1875

No.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STEVEN CATALANOTTE,

Petitioner,

vs.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Questions presented

1. Whether due process is violated by the use of an conviction which is unconstitutional under existing law to enhance a sentence for a later offense where the earlier conviction was unconstitutional when it was obtained.

2. Whether due process is violated by application of principles of retroactivity to hold that conviction which is unconstitutional under existing law can be used to enhance a sentence for a later offense.

PARTIES INVOLVED [per Rule 21.1 (b)]

Petitioner, Steven Catalanotte, was the defendant in the Supreme Court of Kings County of the State of New York, appellant in the Second Department of the Appellate Division of the Supreme Court of the State of New York and appellant in the Court of Appeals of the State of New York. Respondent, People of the State of New York was the plaintiff in the Supreme Court of Kings County, State of New York, respondent in the Second Department of the Appellate Division of the Supreme Court of the State of New York and respondent in the Court of Appeals of the State of New York.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties Involved	ii
Judgment, Opinion and Order Below	2
Jurisdictional Statement	3
Constitutional Provisions	4
Statement of the Case	5
Nature of the Case	5
Statement of Facts	13
Reasons for Granting the Writ	17
Conclusion	21

1. Due process was denied by enhancement of the defendant's sentence of uncarceration of a later offense based upon the use of an earlier unconstitutional conviction and is contrary to the opinion of the United States Supreme Court in Burgett v. Texas,389 U.S. 109.

Appendices: Page

A. New York Court of Appeals opinion dated December 15, 1988 — App.1

B. New York Court of Appeals order denying motion for reargument dated February 16, 1989. App.2

C. New York Supreme Court Appellate Division, Second Department opinion dated February 16, 1988. App.3

D. Sentence minutes of New York State Supreme Kings County Court dated May 22, 1986 of indictment number 5265/81. App.4

E. Statement of predicate felony Filed in New York State Supreme Court, Kings County under indictment 5265/81 dated May 19, 1986. App.5

TABLE OF AUTHORITIES

CASES

	Page
Burgett v. Texas, 389 U.S. 109	10,17,18
Griffith v. Kentucky, 479 U.S. 314	19
People v. Cuevas, 50 N.Y. 2d 1022	16
People v. Jones, 47 N.Y. 2d 409, cert. denied, 444 U.S., 192	7,8,15
United States v. Johnson, 457 U.S. 314	19

Other Authorities	Page
28 U.S.C. 1257 (3)	3
Supreme Court Rule 20.1	3
Supreme Court Rule 29	3
New York Criminal Procedure Law, section 400.21	6,10-12,15

Constitutional Provisions

Fifth Amendment to the United States Constitution	4
Fourteenth Amendment to the United States Constitution	4

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Petitioner, Steven Catalanotte (hereafter, defendant), prays that a writ of certiorari issue to review the decision of the court of appeals of the State of New York, affirming his sentence as a second felony defender pursuant to section 400.21 and 70.06 of the New York Criminal Procedure Law.

JUDGMENT, OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals of the State of New York affirming the decision of the Second Department of the Appellate Division of the State of New York set out as appendix A. The denial of leave to reargue in the Court of Appeals of the State of New York is set out as Appendix B. The opinion of the Second Department of the State of New York, affirming the trial court decision is set out as Appendix C. The sentence minutes of the New York State Supreme Court, Kings County indictment number 5265/81 dated May 22, 1986 is set out as Appendix D. The statement of predicated felony filed in the New York State Supreme Court, Kings County under indictment number 5265/81, dated May 19, 1986 is set out as Appendix E.

Jurisdictional Statement

On December 15, 1988, the Court of Appeals of the State of New York filed its opinion, affirming the decision of the appellate Division, Second Department of the New York State Supreme Court. On February 16, 1989 the Court of Appeals of the State of New York denied a timely motion to reargue. Jurisdiction is invoked under 28 U.S.C. 1257 (3) and Rules 20.1 and 29 of this Court.

Constitutional Provisions

AMENDMENT [V]

No person shall... be deprived of... liberty...without due process of law...

AMENDMENT [XIV]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall ... deprive any person of ... liberty, without due process of law ...

STATEMENT OF THE CASE

NATURE OF THE CASE

Defendent Steven Catalanotte, entered a plea of guilty to robbery in the second degree (unarmed) under New York Supreme Court, Kings County, indictment number 5265/81 and sentenced the defendant, as a second felony offender to the New York State Department of corrections to an indeterminate sentence of 2 to 4 years. The trial court denied the timely application to find that the defendant was not a second felony offender based upon a first conviction which was

unconstitutional. Pursuant to statute under New York law, an unconstitutional conviction must not be counted towards a finding that a defendant is a second felony offender. The trial court found that the defendant was collaterally stopped from challenging the constitutionality of the first conviction under New York Supreme Court, Kings County indictment number 577/71 because it had been affirmed on appeal. In contending that defendant should not be subject to enhanced incarceration as a second felony offender, the defendant relied upon section 400.21 (7) (b) of the New York State Criminal

Procedure Law, which provides that a conviction obtained in violation of the Constitution of the United States must not be counted towards a finding that a defendant as a second felony offender.

On appeal, the Second Department of the Appellate Division of the New York State Supreme Court did not dispute that the defendant's first conviction was in violation of his constitutional right to a public trial, citing People v Jones, 47 NY2d 409, Cert. denied 444 U.S. 946. This constitutional requirement was enacted after the defendant's conviction had become final.

The new rule held that the summary closing of the courtroom during the testimony of an undercover officer was held to be unconstitutional and reversible error per se. This court held, however, that the defendant was not entitled to the subsequent change in the law because his judgment had become final prior to the new constitutional rule of criminal procedure which was enacted in the Jones decision. Thus, the court held that the defendant could not have the new rule of constitutional law retroactively applied to him.

Thereafter, leave was granted to

the New York Court of Appeals. In a sharply divided opinion, the highest court in the state held by a 4 to 3 vote that the conviction was obtained by means which, if the indictment were tried now, would violate the defendant's rights under the sixth amendment of the United States Constitution as presently appplied by the courts. The majority, however, held that a prior conviction is counted for purposes of a predicate felony finding if it was not in violation of the defendant's rights as defined by the law at the time it was obtained. Thus, the court held the defendant was not entitled

to a benefit of the present law. The majority did concede that a conviction obtained in violation of one's constitutional rights may not be used to enhance punishment for a later offense, citing Burgett v. Texas, 389 U.S. 109, 115.

In support of its holding, the majority relied in the language of the Section 400.21 of the New York State Criminal Procedure Law, (hereafter "CPL") which provides:

> A previous conviction in this or in any other jurisdiction which was obtained in violation of the rights of the applicable provisions of the constitution of the United States must not be counted in determining whether the defendant has been subjected

> to a predicate felony conviction. The defendant may, at any time during the hearing hereunder, controvert an allegation with respect to such conviction in the statement on the grounds that the conviction was unconstitutionally obtained.

In its decision, the majority held that the language of section 400.21 indicates that the validily of the conviction shall be determined as of the time it was entered or by subsequent law applicable to the judgment under principles of retroactivity. The court also held that the defendant was not entitled to a retroactive application of the present rule of constitutional law.

In sharp contrast, the dissenting opinion, declared that Criminal Procedure Law section 400.21 (7)(b) requires that a conviction obtained in violation of a

defendants constitutional rights "must not be counted" and that the statute gives a defendant the right to challenge the constitutionality of a prior conviction during the course of the second felony hearing. The court held that a flawed conviction should not, in fairness, be used a new as a basis for another period of incarceration. In summary, the dissent opposed new use of the infirm conviction to add to the defendant's term of imprisonment for a later conviction since it was in contravention of the legistative intention of 400.21 (7)(b).

STATEMENT OF FACTS

The trial court found that the defendant was a second felony offender upon his plea of guilty in New York Supreme Court, Kings County Indictment 5265/1981. As a predicate felon, the defendant was sentenced to a an indeterminate period of incarceration of 2 to 4 years. This is the minimum sentence allowable for a plea of a D felony for a second felony offender under New York State law. If the defendant was not a predicate felon, he could have been subjected to sentencing he could guidelines which start at a minimum of 1 day imprisonment. This finding was based upon an earlier felony conviction, after trial, under New York Supreme Court, Kings County indictment number

771/1971. The sentencing court held the defendant was collaterally estopped from challenging the validity of the earlier conviction because it had been affirmed by the Second Department of the Appellate Division. The defendant contended that his first conviction was unconstitutional under existing law.

In the earlier conviction, the trial court concluded the defendant was collaterally estopped from challenging the predicate felony finding because his first conviction had been affirmed on appeal prior to the states recognition of this new constitutional rule. The trial court stated that he was giving the defendant the minimum sentence under

the law and that it would give him a lighter sentence if the appellate court ruled that he was not a second felony offender. The defendant timely objected, relying upon section 400.21 (7)(b) of the New York Criminal Procedure Law which provides that a previous conviction obtained in violation of the constitution of the United States must not be counted in determining whether the defendant is to be subjected to the enhanced sentencing guidelines as a predicate felony offender. In support of its position, the defendant relied of the decision by the court appeals in People v. Jones, 47 N.Y. 2d 409, cert. denied, 444 U.S. 192 whereby it was declared that a conviction is unconstitutional

if the courtroom is summarily closed during the testimoney of an undercover officer. See also People v Cuevas, 50 N.Y.2d 1022. Similarly, there is no dispute that the trial court summarily closed the courtroom during the testimony of an undercover officer during this defendant's trial. This is clearly unconstitional under existing law.

The defendant was convicted, after trial, under indictment number 771/1971 and was sentenced to 10 years imprisonment. Now the People seek to enhance the sentence on his conviction under indictment 5265/1981 based on the earlier unconstitional conviction.

REASONS FOR GRANTING CERTIORARI

1.

DUE PROCESS WAS DENIED BY ECHANCEMENT OF THE DEFENDANT'S SENTENCE OF INCARCERATION OF A LATER OFFENSE BASED UPON THE USE OF AN EARLIER UNCONSTITUTIONAL CONVICTION AND IS CONTRARY TO THE OPINION OF THE UNITED STATES SUPREME COURT IN Burgett v. Texas, 389 U.S. 109

The defendant was sentenced to an enhanced period of incarceration for a later conviction based upon a conviction which is unconstitutional under existing law. The highest appellate court, in a 4 to 3 decision, held that a conviction in violation of the sixth amendment of the United States could be used to increase the sentence of the defendant. In support of its decision, the court held that while the defendant's

earlier conviction is unconstitutional under existing law, the conviction can be used because it was constitutional at the time it was obtained.

It is submitted that the constitutionality of a conviction is to be examined at the time that it is used to seek enhancement of a sentence. To be allowed to use an infirm conviction to increase a sentence in a later case denies this defendant of due process.

This is to be distinguished from a situation where a defendant seeks to reverse an earlier conviction on the grounds that is unconstitutional. This defendant only seeks to prevent enhanced punishment of a later offense. Burgett v. Texas, 389 U.S.

109,115. An unconstitutional conviction must not be available for later use even if the constitutional principle is not realized until after a defendant's appeal becomes final.

In Burgett, that defendant was given the benefit of a recently enacted constitutional principle set forth in Gideon v. Wainwright and this Court held that a conviction which is unconstitutional under existing law should not be counted to enhance this sentence. This defendant seeks the benefit of the Burgett rule to his case.

The doctrine of retroactivity should not be a basis to prevent the defendant's challenge to the use of an unconstitutional conviction. This case is strikingly different from the retroactivity cases which are used as a standard to set aside a conviction. See United States v. Johnson, 457 U.S. 537, 542; Griffith v. Kentucky, 479 U.S. 314.

This defendant's point is different: he seeks only to avoid new use of the 1971 conviction that would be unconstitutional now -- to enlarge the term of imprisonment that will be imposed on him now. None of the retroactivity cases addressed by the United States Supreme Court deal with this situation. And none of them deal with a statute that on its face provides that the constitutionality of prior convictions -final judgments for all other purposes can be challenged today. Thus, the retroactivity cases are not precedents for the decision to increase this defendant's sentence.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOSEPH R. GIARAMITA, JR.
Attorney for Petitioner

STATE OF NEW YORK
COURT OF APPEALS

No. 310

The People & c.,
Respondent,
v.

Steven Catalanotte,
a/k/a Steven Catalonotte,
Appellant.

OPINION

This opinion is uncorrected and subject to revision before publications in the New York Reports.

Joseph Giaramita, Jr. , Brooklyn, for appellant.

Elizabeth Holtzman, D.A., Kings County (Darrel B Fields, Barbara D. Underwood, Schulamit Rosenblum of counsel) for respondent.

SIMONS, J.

The question presented on this appeal is whether defendant's sentence as a second felony offender may be predicated upon a 1971 conviction which satisfied constitutional standards when obtained and has survived post conviction collateral attack, but was obtained by means which, if the indictment were tried now, would violate defendant's rights under the sixth amendment of the United States Constitution as presently applied by the courts. Defendant asserts that the prior conviction may not be used to enhance his sentence because in obtaining it the trial court followed a practice of closing

the courtroom which this Court subsequently recognized as unconstitutional. We disagree: for purposes of determining whether prior conviction "was unconstitutionally obtained" (CPL 400.21 [7] [b]) and thus may not be counted for predicate felony purposes - the proper inquiry is to determine whether the conviction was obtained in violation of the defendant's rights as defined by the law at the time of the conviction or by present law which is properly applied to it under recognized principles of retroactivity.

On March 5, 1971 defendant, then a New York City police officer,

sold fifty packets of heroin to an undercover police officer. He was arrested six days later, possessing heroin and methadone, and subsequently convicted of various drug related felonies arising from the two incidents. During trial, the People called as a witness the undercover officer who made the "buy" from defendant. Before the officer testified, the prosecutor requested that the court take judicial notice of the hazards to which testifying undercover officers are generally subject and requested that spectators be excluded. The trial court summarily closed the courtroom to the public

before the officer testified. Defendant appealed his conviction, contending that it had been obtained in violation of his constitutional right to a public trial. His claim was rejected by both the Appellate Division (41 A.D.2d 968) and this court (36 N.Y.2d 192).

Four years later we declared for the first time that the summary closing of a courtroom simply because a witness is an undercover police officer constitutes reversible error (People v. Jones, 47 N.Y.2d 409, cert denied 444 US 946). Deviation from the rule is justified, we said, only when preceded by an inquiry "careful

enough to assure the court that defendant's right to a public trial is not being sacrificed for less than compelling reasons." (id. at 414-415). There had been no such inquiry in defendant's case.

In 1986, defendant was convicted in this case on his guilty plea of attempted robbery in the second degree in satisfaction of an indictment charging him with several crimes for his participation in an armed robbery and subsequent gun battle with the police. He was sentenced as a second felony offender over his objection that the 1971 conviction, used as the predicate, was unconstitutionally

obtained under People v. Jones (47 NY 2d 409, supra). After sentencing, defendant moved pursuant to CPL 440.10 (2) (a) to vacate the 1971 conviction as unconstitutional, urging that the Jones rule should be applied retroactively. The court denied the petition and defendant did not appeal that ruling.

On this appeal, defendant pursues a different route to avoid being sentenced as a predicate felon. He now concedes that Jones should not be applied retroactively to vacate the 1971 conviction. Instead, he argues that the Jones rule should only be applied to prevent the

imposition of enhanced punishment for the 1986 conviction. The Appellate Division affirmed the judgment of conviction but, analyzing defendant's claim solely as whether the Jones rule should be applied retroactively and required vacatur of the 1971 conviction, did not address defendant's primary argument.

A conviction obtained in violation of one's constitutional rights may not be used to enhance punishment for a later offense (Burgett v Texas, 389 US 109, 115). CPLR 400.21 (7) (b) implements that principle. It provides in relevant part: A previous conviction in this or in

any other jurisdiction which was obtained in violation of the rights of the defendant under the applicable provisions of the constitution of the United States must not be counted in determining whether the defendant has been subjected to a predicate felony conviction. The defendant may, at any time during the hearing hereunder, controvert an allegation with respect to such conviction in the statement on the grounds that the conviction was unconstitutionally obtained (emphasis added).

The clear import of the phrases "was obtained" and "was unconstitutionally obtained" indicate

that the validity of the conviction shall be determined as of the time it was entered. An unconstitutional conviction is, by definition, a conviction which was obtained in violation of the defendant's constitutional rights, i.e., his rights as defined by the law existing at the time the conviction was obtained or by subsequent law applicable to the judgment under principles of retroactivity. The conviction does not become unconstitutional merely because the law has changed subsequent to the defendant's direct appeal of that conviction (Linkletter v. Walker, 381 US 618, 628 629; see also, United

States v. Johnson, 457 US 537, 542). Since the predicate felony statute operates upon the prior conviction rather than the prior practice, accepted principles of retroactivity must be applied to determine whether a conviction "was unconstitutionally obtained" and thus may not be counted when the People seek to impose an enhanced sentence. Under those rules, a defendant is entitled to the benefit of any change in the law if the change occurs before his conviction becomes final (see, Griffith v. Kentucky, 479 US 314, 107 S Ct 708, 716) or, if the right at stake is such that the law has engrafted an exception to the traditional rule to permit

collateral attack on judgments of conviction after they have become final (see, e.g., Robinson v. Neil, 409 US 505; [double jeopardy];Ashe v. Swenson, 397 US 436 [same]; Arsenault v. Massachusetts, 393 US 5 [right to counsel at a preliminary hearing]; McConnell v. Rhay, 393 US 293 [right to counsel at sentencing]; Roberts v. Russell, 392 Us 293 [right to confrontation]; Jackson v. Denno, 378 Us 368 [right to pretrial determination of the voluntariness of a confession]).

Defendant's 1971 conviction, which serves as the predicate for his present sentence, meets neither of these criteria. It was not "obtained in

violation of the rights of *** defendant" because the closure of the courtroom during his trial complied with the existing legal requirements for a public trial (see, People v Hinton, 31 N.Y.2d 71, cert denied 396 Us 886; People v Jeckle, 308 NY 56). We so held on defendant's direct appeal (People v Catalanotte, 36 N.Y.2d 192, affg 41 A.D.2d 968). That we subsequently declared a similar procedure unconstitutional in People v Jones (47 N.Y.2d 409, supra) does not, as defendant concedes, make the Jones rule retroactive to prior convictions plain language of the statute, require a finding that the

predicate conviction "was unconstitutionally obtained".

The logic of such an interpretation is manifest when one considers that the proper meaning to be given to broadly stated constitutional commands, such as due process of law and right to a public trial, changes constantly. To apply such changes retroactively when the court has not declared them retroactive, may open to question hundreds of convictions and enhanced sentences based upon them (see, e.g., Batson v Kentucky, 476 US 79 [racial bias in jury selection]; Payton v New York, 445 US 573 [warrantless felony arrest]

(Linkletter v Walker, 381 US 618, 628-629; see also, United States v Johnson, 457 US 537, 542). Since the predicate felony statute operates upon the prior conviction rather than the prior practice, accepted principles of retroactivity must be applied to determine whether a conviction "was unconstitutionally obtained" and thus may not be counted when the People seek to impose an enhanced sentence. Under those rules, a defendant is entitled to the benefit of any change in the law if the change occurs before his conviction becomes final (see, Griffith v Kentucky, 479 US 314, _____, 107 S Ct 708, 716) or, if the right at stake is such that the law has engrafted an exception to the traditional rule to permit collateral attack on judgments of conviction after they have

become final (see, e.g., Robinson v Neil, 409 US 505; [double jeopardy]; Ashe v Swenson, 397 US 436 [same]; Arsenault v Massachusetts, 393 US 5 [right to counsel at a preliminary hearing]; McConnell v Rhay, 393 [right to pretrial determination of the voluntariness of a confession]).

Defendant's 1971 conviction, which serves as the predicate for his present sentence, meets neither of these criteria. It was not "obtained in violation of the rights of *** defendant" because the closure of the courtroom during his trial (see, People v Hinton, 31 N.Y.2d 71, cert denied 410 US 911; People v Hogan, 24 N.Y.2d 395, cert denied 396 US 886; People v Jeckle, 308 NY 56). We so held on defendant's direct appeal (People v Catalanotte, 36 N.Y.2d 192,

affg 41 A.D.2d 968). That we subsequently declared a similar procedure unconstitutional in People v Jones (47 N.Y.2d 409, supra) does not, as defendant concedes, make the Jones rule retroactive to prior convictions that have survived direct appeal, nor does it, in view of the plain language of the statute, require a finding that the predicate conviction "was unconstitutionally obtained".

The logic of such an interpretation is manifest when one considers that the proper meaning to be given to broadly stated constitutional commands, such as due process of law and right to a public trial, changes constantly. To apply such changes retroactively when the court has not declared them retroactive, may open to question hundreds of convictions and enhanced sentences based upon them (see, e.g., Batson v Kentuky,

476 US 79 [racial bias in jury selection]; Payton v New York, 445 US 573 [warrantless felony arrest in home]; Sandstromv Montana, 442 US 510 [improper jury charge]; Griffin v California, 380 US 609 [comment by prosecutor or judge upon defendant's failure to testify]). The dissent assumes such convictions and others like them were unconstitutionally obtained even though they concededly cannot be vacated in post-conviction proceedings. It holds that no matter how drastically the law has modified between the time of the first conviction and the second, any change renders the first conviction unconstitutional for the purpose of enhanced sentencing. Its rule would invalidate the conviction for such purpose

even if the infirmity was not challenged at the time of the first conviction because under current law, if the predicate conviction "was unconstitutionally obtained", the defendant does not have to raise the constitutional deprivation on direct appeal from the first conviction(see, People v Harris, 61 N.Y.2d 9, 16; People v Wright, 119 A.D.2d 973). A defendant would not be required to anticipate a future change in the law as did the defendant in this case. For example, and using the illustration cited above, under the dissent's view, past convictions obtained by a jury selected along racial lines would be open to question, at least for enhanced sentencing purposes, even though constitutional rules in effect at the time were followed by the trial court

(compare Swain v Alabama, 380 US 202 and People v McCray, 57 N.Y.2d 542 with Batson v Kentucky, 476 US 79, supra). Similarly, convictions obtained through the use of confessions or real evidence properly obtained under existing law, but now open to question in view of Payton, supra, and convictions obtained after trials in which Sandstrom charges were given would be nullified for enhanced sentencing purposes, regardless of whether defendant objected at trial. The statute does not require this result, nothing indicates the Legislature intended it and there are no policy reasons for ordering it.

Finally, we note that People v Love (71 N.Y.2d 711), relied upon by the defendant and the dissent, is clearly distinguishable.

In that case the defendant's prior conviction was vacated because it was obtained in violation of his constitutional rights under the law that existed at the time of the conviction. Here, defendant's constitutional rights, as then defined, were respected in full.

Accordingly, the order of the Appellate Division, insofar as appealed from, should be affirmed.

People v Steven Catalanotte

Kaye, J. (dissenting):

CPL 400.21(7)(b) declares that a previous conviction obtained in violation of a defendant's federal constitutional rights "must not be counted" in determining second felony offender status. To that end, the statute gives a defendant the right to first challenge the unconstitutionality of a prior conviction at any time during the course of the second felony hearing. The statute bespeaks a legislative intention that--while a prior unconstitutional conviction may not be undone, indeed a defendant may already have served a lengthy term of imprisonment--that flawed conviction should not, in fairness, be used a new as the basis for another period of incarceration. (For those

found to be second felony offenders, the minimum and maximum sentences are materially increased. [See, Penal Law § 70.06].)

This case fits the statute in letter and spirit. In 1971, defendant was convicted of various drug offenses under circumstances the majority concedes would compel reversal as a matter of federal constitutional law were he tried today. Despite his diligent efforts to litigate the constitutional issue, the courts recognized the merit of his claim only four years later in an unrelated case, after defendant had exhausted his avenues of appeal. Now the People seek to make new use of the 1971 conviction to add to defendant's term of imprisonment for a 1986 robbery conviction. To my mind, CPL 400.21(7)(b) proscribes this use of the

earlier conviction, and I therefore respectfully dissent.

In concluding that defendant may be subjected to increased imprisonment based on the 1971 conviction, the majority reads restrictions into the plain language of the statute that are simply not there.

The Court holds that the statute's use of past tense-prohibiting use of a conviction that "was obtained" or "was unconstitutionally obtained"--signals a legislative direction that the validity of the conviction is to be determined "as of the time it was entered." (Slip on p 4.) In that the statute deals with past convictions, use of the past tense is inevitable. Nothing in the statute limits its application to convictions that were

obtained in violation of defendant's rights as courts were willing to recognize them at the moment of conviction, nor does the statute call for application of retroactivity principles. Had the Legislature intended to so confine the statute, it could have and undoubtedly would have said so.

The Court's analysis, like that of the Appellate Division, proceeds on the promise that the issue is solely a question of retroactivity. But it should be immediately apparent that this case is strikingly different from the retroactivity cases (see, slip on, p 5). Defendant is not seeking to apply People v Jones (47 N.Y.2d 409) retroactively to nullify his 1971 conviction. Vacatur of that conviction was denied in his separate post-sentencing

proceeding pursuant to CPL 440.10. He took no appeal from that decision, served his sentence, and concedes that the constitutional deprivation cannot be remedied retroactively by overturning the conviction. His point is different: he seeks only to avoid new use of the 1971 conviction--that would be unconstitutional now--to enlarge the term of imprisonment that will be imposed on him now. None of the cited cases deal with this situation. And none of them deal with a statute that on its face provides that the constitutional point had never been raised during the prior litigation. Thus, the cited retroactivity cases are not precedents for the Court's decision under CPL 400.21(7)(b).

Nor are the retroactivity cases--even if applicable in theory dispositive of the

issues before us. While the Supreme Court's jurisprudence on retroactivity has evolved considerably over time, it is plain that the doctrine is founded on nothing more that fairness and practicality (see generally, Griffith v Kentucky, 479 US 314; Linkletter v Walker, 381 US 618). The decision to give a newly announced constitutional rule only prospective effect is distinctly not founded on any perception that previous failures were not also deprivations of a federal constitutional right. If the law in effect at the time of a conviction were dispositive on constitutionality, as suggested by the majority (slip on at 4-5), there would be no reason to apply a newly announced decision to convictions in other cases pending on appeal. Thus, whether or not People v Jones

(supra) is retroactive, it is true today that defendant's 1971 conviction was actually obtained in violation of his rights under the federal Constitution, and the case falls squarely within the prohibition of CPL 400.21(7)(b) against renewed use of such convictions.

Accordingly, our recent decision in People v Love (71 N.Y.2d 711) is not "clearly distinguishable," as the majority claims (slip on at 7). While it is true that the constitutional violation suffered by the defendant in that case was a denial of the right to counsel--a violation recognized even under the law in effect at the time of the conviction-that happenstance was not critical to our decision. Rather, the

decision was based on our interpretation of CPL 400.21(7)(b) as intending a broad mandate that "a person convicted of a crime should not be treated as a repeat offender... simply because in the last 10 years he was unconstitutionally convicted and deprived of his liberty" (Id. at 717).*

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*Significantly, the use sought to be made of the unconstitutionally obtained conviction in Love was indirect: the People sought to use not the unconstitutional conviction itself, but the time period during which Love was incarcerated pursuant to that conviction to toll the running of a 10-year limitation period under Penal Law § 70.06(1)(b)(iv) so that an earlier, concededly constitutional conviction might be counted as a predicate felony. Notwithstanding the People's claim that there was no constitutional impediment to such a use of the unconstitutional conviction, we held that CPL 400.21(7)(b) prohibited even that indirect use. The majority's decision today--which, under the same statutory language, countenances a direct use of an unconstitutionally obtained conviction to increase defendant's punishment--is completely at odds with Love.

It is clear that, in engrafting the new restrictions onto CPL 400.21(7)(b), the Court's real concern is simply the perceived practical impact of enforcing the statute as written. Without the restrictions now imposed by the Court, the majority fears that "hundreds of convictions and enhanced sentences based upon them" may be "open to question" (slip opn at 6). Such a concern begs the question of what the Legislature intended; if the costs of the statutory prohibition are high, that is a determination for the Legislature to make, not the Court. But it is also a misplaced concern. Since CPL 400.21(7)(b) applies only to second felony offender determinations, a proper and fair leading of its statute does not open any convictions to question. And since the

statute itself provides that claims of unconstitutionality with respect to prior convictions are waived if not asserted at the predicate felony hearing, it is equally clear that enhanced sentences would not now be generally thrown open to question.

The vast majority of convictions are obtained under circumstances that are accepted as constitutional both at the time of conviction and at subsequent predicate felony proceedings. In those instances where a defendant is able to overcome the considerable burden of proof and succeed in establishing that the prosecution had actually exercised its peremptory challenges in a racially discriminatory fashion (Batson v Kentucky, 476 US 79)--to use the majority's own example (slip opn at 7)--such a conviction should not now be given new vitality as the

basis for additional punishment. CPL 400.21(7)(b) so provides.

* * * * * * * * * * *

Order insofar as appealed from affirmed. Opinion by Judge Simons in which Chief Judge Wachtler and Judges Alexander and Bellacosa concur. Judge Kaye dissents and votes to reverse in an opinion in which Judges Titone and Hancock concur.

Decided December 15, 1988

Mo. No. 33

Motion for reargument denied.

The People &c.,
Respondent,
v.

Steven Catalanotte,
Appellant.

DECISION
COURT OF APPEALS

FEBRUARY 16,1989

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

App.3

2076p
Z/eb

A.D.2d

Argued
- May 28,1987

MILTON MOLLEN. P.J.
RICHARD A. BROWN
ISAAC RUBIN
JOSEPH J. JUNZEMAN, JJ.

743E

The People, etc., respondent,
v Steven Catalanotte a/k/a
Steven Catalanotte, appellate.
(Ind. No. 5265/81)

DECISION
& ORDER

Joseph R. Giaramita, Jr.. Brooklyn N.Y.. for appellant.

Elizabeth Holtzman. District Attorney. Brooklyn, N.Y. (Barbara D. Underwood. Darrell B. Fields and Catherine A. Keane of counsel). for respondent.

Appeal by the defendant from a judgment of the Supreme Court. Kings County (Owens.J.), rendered May 22, 1986. convicting

him of attempted robbery in the second degree, upon his plea of guilty, and imposing sentence.

ORDERED that the Judgment is affirmed, and the matter is remitted to the Supreme Court. Kings County, for further proceedings pursuant to CPL 460.50(5).

The defendant contends that the court erroneously adjudicated and sentenced him as a second felony offender because his 1971 predicate felony conviction was obtained in violations of his constitutional right to a public trial. In the 1971 case, the trial court summarily closed the courtroom during the testimony of an undercover officer after a request from the prosecutor to take judicial notice of the jeopardy such agents are subjected to by reason of their occupation. On the defendant's direct appeal from the 1971 judgment of conviction, that issue was raised and rejected, on the merits, by majority of this court (see, People v Catalanotte, 41 A.D.2d 968) and by the Court of Appeals (see, People v Catalanotte, 36 NY 2d 192). Subsequently, in People v Jones (47 N.Y.2d 409, cert denied 444 US 946), the Court of Appeals held that it was reversible error to summarily close the courtroom

While the Court of Appeals in People v Jones (47 N.Y.2d 409, supra) did not announce an entirely new and unanticipated principle of law (see. People v Boyd. 59 A.D.2d 558: People v Castro. 63 A.D.2d 891), it did resolve a previously unsettled point of law (see, e.g. People v Garcia. 51 A.D.2d, affd 41 N.Y.2d 861) pertaining to "the methodology by which a court was to go about the business of determining whether the facts underlying the [closure] application fell within the standards enunciated in the cases [construcing the right to a public trial]" (People v Jones, supra, at 414). Consequently, the Jones rule falls within the middle of two extreme categories: it is neither a decision which merely explicates settled precedents to new and different factual situations, nor is the decision a clear break with the past. Since the Jones rule falls within an intermediated position, retroactivity is more appropriately restricted to cases still on review of case law discloses that appellate courts have applied the commonlaw doctrine of retroactivity and have given the Jones rule retroactive application to all cases on direct review at the time Jones was decided (see, People v Brown, 79 A.D.2d 659: People v Gonzalez, 74 A.D.2d 928: People v Cousart, 74 A.D.2d 877: People v McNamee, 71 A.D.2d 559). However, we cannot say that the Jones rule had such a fundamental impact on the integrity of the fact finding process as to compel complete retroactivity. Absent

manifest injustice, the defendant is not entitled to benefit from the change in the law (see, People v Pepper, 53 N.Y.2d 213 cert denied 454 US 967). Accordingly, the sentencing court properly adjudicated and sentenced the defendant as a second felony offender (cf., Burgett v Texas, 389 US 109. 114).

MOLLEN. P.J., BROWN, RUBIN and KUNZEMAN, JJ., concur

ENTER:

MARTIN H. BROWNSTEIN Clerk

February 16, 1988 743E

PEOPLE v CATALANOTTE, STEVEN
A/K/A CATALONOTTE, STEVEN

SUPREME COURT:STATE OF NEW YORK
COUNTY OF KINGS:CRIMINAL TERM:PART 38

X

THE PEOPLE OF THE STATE OF NEW YORK

Ind.#
-against- 5265/81

STEVE CATALANOTTE Att.
Rob.2

Defendant. Sentence

X

360 Adams Street
Brooklyn, N.Y.
May 22,1986

B e f o r e :

HONORABLE THADDEUS E. OWENS,

Justice

A p p e a r a n c e s :

ELIZABETH HOLTZMAN,ESQ.
District Attorney,
Kings County
BY: JONATHAN FAIRBANKS,ESQ.
Assistant District Attorney

JOSEPH GIARAMITA,JR.,ESQ.
2775 East 12th Street
Brooklyn, New York
NEW ADDRESS:
1797 Stillwell Ave.
Brooklyn, N.Y. 11223

Herman Nyrin
Official Court Reporter

MR. GIARAMITA: First, I would like to acknowledge receiptment of the Predicate Felony Statement pursuant to 400.15, 400.16 and 400.21.

THE CLERK: Does he admit the conviction as stated in the predicate felony statement, does he deny it or does he stand mute?

MR. GIARAMITA: He admits it, but he contests the Constitutionality of that first conviction.

THE CLERK: That was after a trial. Any Constitutional infringement that may have been committed would have to be resolved by an appellate court.

MR. GIARAMITA: He did address an issue on appeal from the 1971 conviction. The

conviction was affirmed by the Appellate Division. And his honor indicated to me that his position was a collateral estoppel as to that indictment.

Nevertheless, we take issue with that, and for purposes of a record, under 400.21, my client maintains that his trial was unconstitutional in that it was not public trial under People versus Jones, 47NY2d.

And also maintains that he is not a predicate felon under 70.06, in that the Predicate Felony Statue of 70.06 was enacted in September of 1973, and it says under Section 33 of Chapter 276 of the Regular Sessions Laws of New York do not apply to or govern the construction and punishment for any offense committed prior to the effective date of this Act. "This" Act being September, 1973. Or the construction and

application of any offense must be construed and punishment must be accorded according to the provisions of the law existing at the time of the commission thereof in the same manner as if this Act had not been enacted.

Therefore, we are submitting that the intent of Legislature was not to include a 1971 conviction under the law that was enacted in 1973.

Your Honor, I went to the Appellate Division and I called up Jonathan Fairbanks and indicated that I was going to make a bail application. However, I want to bring to your Honor's attention that under 530.35, when you do a bail application after conviction but before sentence, there is no provision in the CPL that allows for bail

application until sentence has been imposed by the Court. The only time you can make a bail application is before sentence is imposed or when bail has been revoked and a greater bail has been imposed on the defendant.

That doesn't seem proper that if you keep the bail conditions the same, then my client cannot make that same bail application, and our application for bail was rejected. I have an Order to Show Cause that I am going to give to the Appellate Division right now.

THE COURT: It was rejected for the simple reason that there was nothing in front of the Appellate Division on which it could act. The Appellate Division could only act if a sentence had already been imposed. Then you can make an application before the

Appellate Division to permit him to remain out on bail pending an appeal.

MR. GIARAMITA: I have that right in front of me. For the purpose of his job and in light of the caselaw that indicates he should be given bail. And I am asking that we be able to go right now to the Appellate Division and make this application.

THE COURT: I will have to remand him until then.

MR. GIARAMITA: That's within you Honor's discretion under 530.35.

THE COURT: I have no discretion, I must remand him now.

Off the record.

(Off-the-record discussion.)

MR. GIARAMITA: I move to dismiss the three counts of robbery in the first degree.

MR. FAIRBANKS: No obligation.

THE COURT: Granted.

MR. FAIRBANKS: The reason for doing that is because of the plea negotiations in this case and because it is the People's position that the plea to the Attempted Robbery in 2d Degree covers this entire indictment.

However, should this case be reversed or remanded to this Court, it is the People's position that he can be tried on the Robbery in the First Degree.

THE COURT: And that the Robbery in the First Degree would be reinstated?

MR. FAIRBANKS: Yes.

THE CLERK: Also, two counts of criminal use of a firearm in the first degree is a violation B Felony.

MR. FAIRBANKS: Under the same reasoning, the People would move to dismiss that also.

THE CLERK: Counselor, is there anything that you wish to say before sentence is pronounced?

MR. GIARAMITA: Yes.

THE COURT: The defendant is adjudicated a second felony offender.

MR. GIARAMITA: I take exception to his Honor's ruling, for the purpose of the record.

I am serving a copy of the Notice of Appeal on the Supreme Court today, and on The People of the sentence, but not the conviction on the sentence.

(recess)

THE CLERK: We are ready to pronounce sentence at this time.

THE COURT: Counselor, the minimum

sentence that I can give your client is two to four years under the law.

The defendant is sentenced to the New York State Department of Correctional Services for a minimum of two years, and a maximum of four years.

THE CLERK: You may appeal from this sentence just imposed upon you by filling a notice of appeal with the Clerk of this Court in duplicate within thirty days from this date.

A similar notice must be served upon the District Attorney of Kings County.

If you cannot afford to retain counsel for this purpose, you may write to the Appellate Division, 45 Monroe Place, Brooklyn, New York and they will provide an attorney

free of cost.

You have been adjudicated a second felony offender, and you have been sentenced to a minimum of two years and a maximum of four years to the New York State Department of Correctional Services.

THE COURT: If the Appellate Division rules that he is not a second felony offender, then I will give him a lighter sentence. I don't know what it will be, but it will be less than I have given him today.

CERTIFIED AN ACCURATE TRANSCRIPT

Norman Nyrin
Official Court Reporter

COUNTY OF KINGS: CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff,

-against-

STEVEN CATALANOTTE

Defendant.

Ind. No. 5265/81

STATEMENT PURSUANT TO CPL ARTICLE 400(CPL §§400.15 400.16 & 400.21)

PLEASE TAKE NOTICE that upon information presently available the District Attorney of the County of Kings hereby charges that the Defendant has previously been convicted of:

CRIME	PREDICATE VFC	DATE OF SENTENCE	INDICTMENT JURISDICT.	NUMBER
CSCS 3°	No	12/29/71	Kings County	577-71

Each conviction shown above which occurred within the State of New York is for a felony, and each such conviction which occurred in another jurisdiction is for an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this State.

Each conviction designated above as a "Predicate VFC" is a predicate violent felony conviction as defined in paragraph (b) of subdivision one of Penal Law §70.04.

In addition each sentence was imposed upon the defendant not more than ten years before Nov. 4, 1981, the date of the commission of the present felony except as indicated below.*

* Where sentence upon a prior Felony conviction has been imposed more than ten years before the commission of the present felony, the ten year statutory period has been extended by a total of years representing the period of time between the commission of both crimes during which defendant was incarcerated for any reason. More particularly, the defendant was incarcerated at:

INSTITUTION	COMMENCING	TERMINATING

Dated: Brooklyn, New York
May 19, 1986

ELIZABETH HOLTZMAN
DISTRICT ATTORNEY
BY: JONATHAN FAIRBANKS
ASSISTANT DISTRICT ATTORNEY

SC-136 1/83

FILED
JUN 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1875

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STEVEN CATALANOTTE,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

ELIZABETH HOLTZMAN
District Attorney
Kings County

BARBARA D. UNDERWOOD*
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(718) 802-2156

**Counsel of Record for Respondent*

June 16, 1989

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review defendant's due process claim when defendant failed to raise the claim in state court, and the state courts did not rule on the issue.

2. Whether the Sixth Amendment right to a public trial or the Fourteenth Amendment right to due process requires that full retroactivity be accorded to a 1979 state court holding that specified procedures for courtroom closure during the testimony of an undercover police officer.

3. Whether due process requires that a conviction that is final and valid under settled principles of retroactivity be invalidated, under a subsequent nonretroactive holding on procedures for courtroom closure, for the limited purpose of recidivist sentencing.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS WHY THE WRIT SHOULD BE DENIED	5
I. THIS COURT LACKS JURISDICTION TO REVIEW DEFENDANT'S DUE PROCESS CLAIM BECAUSE DEFENDANT DID NOT RAISE THE CLAIM IN STATE COURT, AND THE STATE COURTS DID NOT RULE ON THE ISSUE	6
II. THE NEW YORK COURT OF APPEALS PROPERLY CONCLUDED THAT *PEOPLE V. JONES* IS NOT RETROACTIVE	8
1. The *Jones* rule does not "go to the heart" of a reliable determination of guilt or innocence	10
2. The adverse impact on the administration of justice and the state's reliance on pre-*Jones* law, compel nonretroactive application of the *Jones* decision	13

PAGE

III. DUE PROCESS DOES NOT REQUIRE THAT A CONVICTION WHICH IS FINAL AND VALID UNDER SETTLED PRINCIPLES OF RETROACTIVITY BE INVALIDATED FOR THE LIMITED PURPOSE OF RECIDIVIST SENTENCING 14

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED IN ALL RESPECTS 18

APPENDIX

Opinion of the New York Supreme Court, Criminal Term, Kings County, dated September 25, 1986 ..... 1a

Defendant's Letter to the New York Court of Appeals, dated April 7, 1988 ..... 3a

Defendant's Brief to the New York Court of Appeals, dated June 16, 1988 (pp. 6-14) 5a

Defendant's Brief to the Appellate Division of the New York Supreme Court, Second Judicial Department, dated November 28, 1986 (pp. 6-7) 13a

TABLE OF AUTHORITIES

Cases: PAGE

Allen v. Hardy, 478 U.S. 255, 106 S. Ct. 2878 (1986) 9, 11, 14

Baldasar v. Illinois, 446 U.S. 222 (1980) 15

Brown v. Louisiana, 447 U.S. 323 (1980) 10-11

Burgett v. Texas, 389 U.S. 109 (1967) 6, 14-16

Cardinale v. Louisiana, 394 U.S. 437 (1969) 7-8

Desist v. United States, 394 U.S. 244 (1969) 10

Doughty v. Maxwell, 376 U.S. 202 (1964) 15

Gideon v. Wainwright, 372 U.S. 335 (1963) 6, 11, 15-16

Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. 708 (1987) 9-10

Heath v. Alabama, 474 U.S. 82, 106 S. Ct. 433 (1985) . 7

Jackson v. Denno, 378 U.S. 368 (1964) 11

Johnson v. New Jersey, 384 U.S. 719 (1966) 12

Jones v. Henderson, 683 F. Supp. 917 (E.D.N.Y. 1988) 9

Linkletter v. Walker, 381 U.S. 618 (1965) 6, 15-17

Loper v. Beto, 405 U.S. 473 (1972) 15

Mapp v. Ohio, 367 U.S. 643 (1961) 16

Oyler v. Boles, 368 U.S. 448 (1962) 7

People v. Boucher, 112 A.D.2d 310, 491 N.Y.S.2d 756 (2d Dep't 1985) 13

People v. Cantone, 73 A.D.2d 936, 423 N.Y.S.2d 507 (2d Dep't 1980) 13

PAGE

People v. Catalanotte, 41 A.D.2d 968, 344 N.Y.S.2d 72 (2d Dep't 1973), *aff'd*, 36 N.Y.2d 192, 366 N.Y.S.2d 403 (1975) 4

People v. Catalanotte, 137 A.D.2d 697, 524 N.Y.S.2d 788 (2d Dep't 1988), *leave granted*, 71 N.Y.2d 967, 529 N.Y.S.2d 78 (1988) 4

People v. Catalanotte, 72 N.Y.2d 641, 536 N.Y.S.2d 16 (1988), *reh'g denied*, 73 N.Y.2d 918, 539 N.Y.S.2d 302 (1989) 5, 8, 9, 13

People v. Cousart, 74 A.D.2d 877, 426 N.Y.S.2d 295 (2d Dep't 1980) 13

People v. Cuevas, 50 N.Y.2d 1022, 431 N.Y.S.2d 686 (1980) 9, 13

People v. Davis, 72 A.D.2d 798, 421 N.Y.S.2d 628 (2d Dep't 1979) 13-14

People v. Gonzalez, 74 A.D.2d 928, 426 N.Y.S.2d 318 (2d Dep't 1980)..... 13

People v. Gutierrez, 133 A.D.2d 647, 519 N.Y.S.2d 756 (2d Dep't 1987)..... 13

People v. Hagen, 24 N.Y.2d 395, 300 N.Y.S.2d 835, *cert. denied*, 396 U.S. 886 (1969) 13

People v. Hinton, 31 N.Y.2d 71 (1972), 334 N.Y.S.2d 885, *cert. denied*, 410 U.S. 911 (1973)..... 13

People v. Jones, 47 N.Y.2d 409, 418 N.Y.S.2d 359, *cert. denied*, 444 U.S. 946 (1979).....4, *passim*

People v. Policano, 139 A.D.2d 773, 527 N.Y.S.2d 519 (2d Dep't 1988)..... 13

People v. Pollock, 50 N.Y.2d 547, 429 N.Y.S.2d 628 (1980) 13

PAGE

People v. Romain, 137 A.D.2d 848, 525 N.Y.S.2d 313 (2d Dep't 1988) 13

People v. Stanton, 108 A.D.2d 688, 485 N.Y.S.2d 998 (1st Dep't 1985) 13

Pickelsimer v. Wainwright, 375 U.S. 2 (1963) 15

Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984) 9

Santos v. Brown, 596 F. Supp. 214 (D.R.I. 1984) 9

Solem v. Stumes, 465 U.S. 638 (1984) 10-11, 14

Stovall v. Denno, 388 U.S. 293 (1967) 10-11

Tehan v. United States, 382 U.S. 406 (1966) 6, 13, 15

United States v. Johnson, 457 U.S. 537 (1982) 9, 14

United States v. Tucker, 404 U.S. 443 (1972) 15

Waller v. Georgia, 467 U.S. 39 (1984) 9

Williams v. United States, 401 U.S. 646 (1971) 11

Statutes:

28 U.S.C. § 1257(a) (1966 and Supp. 1989) 8

N.Y. Crim. Proc. Law § 400.21(7)(b) (McKinney 1983) 4-6, 7-8

N.Y. Crim. Proc. Law § 440.10(2)(a) (McKinney 1983). 4

Other Authorities:

Supreme Court Rule 17.1 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1875

STEVEN CATALANOTTE,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the State of New York, asks this Court to deny the petition for a writ of certiorari, which seeks review of the judgment of the New York Court of Appeals that affirmed defendant's sentence as a second felony offender, upon his conviction of attempted robbery in the second degree, on his guilty plea. That judgment affirmed an order of the Appellate Division of the Supreme Court, Second Judicial Department.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 72 N.Y.2d 641, 536 N.Y.S.2d 16 (1988). The opinion of the Appellate Division is reported at 137 A.D.2d 697, 524 N.Y.S.2d 788 (2d Dep't 1988). The opinion of the trial court denying defendant's motion to vacate a 1971 conviction that was the

predicate for his being adjudicated a second felony offender is not reported but is reproduced in the Appendix to this response.

JURISDICTION

The judgment of the New York Court of Appeals was entered on December 15, 1988. On February 16, 1989, defendant's motion for reargument was denied. 73 N.Y.2d 918, 539 N.Y.S.2d 302 (1989). The petition was docketed in this Court on April 17, 1989, which is within the statutory time.[1] This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a) (1966 and Supp. 1989).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .

U.S. Const. Amend. XIV § 1

. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

N.Y. Crim. Proc. Law § 400.21(7)(b)

A previous conviction in this or any other jurisdiction which was obtained in violation of the rights of the defendant under the applicable provisions of the constitution of the United States must not be counted in determining whether the defendant had been subjected to a predicate felony conviction. The defendant may, at any time during the course of the hearing hereunder controvert an allegation with respect to such convic-

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1 This Court initially returned defendant's petition, by letter dated April 19, 1989, because the petition failed to conform to the Court's rules on style and format. Defendant thereafter filed a corrected copy which respondent received on May 17, 1989.

tion in the statement on the grounds that the conviction was unconstitutionally obtained. Failure to challenge the previous conviction in the manner provided herein constitutes a waiver on the part of the defendant of any allegation of unconstitutionality unless good cause be shown for such failure to make timely challenge.

STATEMENT OF THE CASE

Defendant Steven Catalanotte was convicted of attempted robbery, on a plea of guilty, for a gunpoint robbery that he and an accomplice committed on a Brooklyn street. On November 4, 1981, he and his accomplice took a bag of jewelry from Charles Krypel at gunpoint; they planned to sell the jewelry and share the proceeds. On fleeing the robbery, defendant and the accomplice got into a gun battle with police and fired several shots at a police officer.[2]

Defendant was indicted for several counts of Robbery in the First Degree and Robbery in the Second Degree, and several counts of Assault, and other offenses.[3] On April 2, 1986, defendant pled guilty to Attempted Robbery in the Second Degree.[4] At sentence, the prosecution sought to have defendant adjudicated a second felony offender, based on a 1971 conviction for narcotics offenses which defendant had appealed and which

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2 The accomplice was arrested the next day, but defendant fled the jurisdiction and was not arraigned until June 19, 1985.

3 The crimes for which defendant and his accomplice were indicted were three counts of Robbery in the First Degree (P.L. § 160.15[2], [3], and [4]); Robbery in the Second Degree (P.L. § 160.10[1]); Attempted Aggravated Assault Upon a Peace Officer (P.L. §§ 110.00/120.11); Attempted Assault in the Second Degree (P.L. §§ 110.00/120.05[3]); Criminal Possession of a Weapon in the Second Degree (P.L. § 265.03); two counts of Criminal Use of a Firearm in the First Degree (P.L. § 265.09); Grand Larceny in the Second Degree (P.L. § 155.35 [1965] [amended 1986]); Criminal Possession of Stolen Property in the First Degree (P.L. § 165.50 [1965] [amended 1986]).

4 The accomplice, Dennis Schwartz, pled guilty to Attempted Robbery in the First Degree and on February 4, 1983, was sentenced to a term of imprisonment of four to eight years.

had been affirmed. *People v. Catalanotte*, 41 A.D.2d 968, 344 N.Y.S.2d 72 (2d Dep't 1973), *aff'd*, 36 N.Y.2d 192, 366 N.Y.S.2d 403 (1975). Defendant asserted that he could not be adjudicated a second felony offender because the 1971 conviction had been obtained in violation of his Sixth Amendment right to a public trial, as construed by *People v. Jones*, 47 N.Y.2d 409, 418 N.Y.S.2d 359, *cert. denied*, 444 U.S. 946 (1979). In *Jones*, decided four years after defendant had exhausted his appeal on his 1971 conviction, the New York Court of Appeals held that before a trial court could close the courtroom during the testimony of a witness, the Sixth Amendment guarantee of a public trial required that the court make an inquiry of the witness to establish the reasons for closure and make factual findings based on that inquiry. *Jones*, 47 N.Y. 2d at 414-15, 418 N.Y.S.2d at 362-64. The trial court, rejecting that claim, adjudicated defendant a second felony offender, pursuant to N.Y. Crim. Proc. Law § 400.21(7)(b) (McKinney 1983). The court imposed a sentence of two to four years, a sentence which could not have been imposed on a first offender.

Defendant then moved unsuccessfully in the trial court to vacate the 1971 conviction, under N.Y. Crim. Proc. Law § 440.10(2)(a) (McKinney 1983), on the ground that *Jones* applied retroactively to his 1971 conviction and rendered that conviction unconstitutional. The trial court held that *Jones* was not retroactive and denied the motion. Defendant never sought appellate review of that decision.

Defendant then appealed the 1986 judgment to the Appellate Division, Second Department, asserting that the second felony offender sentence was unlawful because *Jones* rendered the 1971 conviction "unconstitutional" within the meaning of N.Y. Crim. Proc. Law § 400.21(7)(b), even if *Jones* did not apply retroactively on a motion to vacate the 1971 judgment. The Appellate Division held that *Jones* was not retroactive to collateral attacks on the validity of convictions and affirmed the judgment of conviction. *People v. Catalanotte*, 137 A.D.2d 697, 524 N.Y.S.2d 788 (2d Dep't 1988).

Defendant then appealed to the New York Court of Appeals, arguing that under N.Y. Crim. Proc. Law § 400.21(7)(b) the constitutionality of a predicate conviction is to be determined by the law in effect when that conviction is used to enhance a sentence for a later crime. Defendant conceded that *Jones* was not retroactive. *People v. Catalanotte*, 72 N.Y.2d 641, 644, 536 N.Y.S.2d 16, 17 (1988). He argued, however, that because the statute did not explicitly provide that the retroactivity of a constitutional decision be considered, retroactivity principles did not apply under the statute. The Court of Appeals rejected defendant's claim and affirmed the order of the Appellate Division, holding that,

> [F]or purposes of determining whether a prior conviction was unconstitutionally obtained (C.P.L. 400.21(7)(b))—and thus may not be counted for predicate felony purposes—the proper inquiry is to determine whether the conviction was obtained in violation of the defendant's rights as defined by the law at the time of conviction or by present law which is properly applied to it under recognized principles of retroactivity.

72 N.Y.2d at 643, 536 N.Y.S.2d at 17.

This petition followed.

REASONS WHY THE WRIT SHOULD BE DENIED

Nothing in defendant's petition, nor in the decision of the New York Court of Appeals, presents an issue of law worthy of this Court's review. Defendant claims that he was denied due process when he was sentenced for robbery as a recidivist in 1986 based on his 1971 narcotics conviction. According to defendant, a change in the law, announced after his 1971 conviction became final, rendered that conviction "unconstitutional" within the meaning of New York's second felony offender statute. Resolution of this claim, however, involves a straightforward application of settled principles of retroactivity, and the interpretation of a state statutory procedure for determining when a convicted defendant is subject to the

increased penalty prescribed for recidivists. *See* N.Y. Crim. Proc. Law § 400.21(7)(b). Neither of these issues merits this Court's review.

The state court's interpretation of its recidivist sentencing statute presents only a question of state law not reviewable by this Court. The determination that *Jones* was not retroactive also does not merit review. Defendant conceded below that *Jones* was not retroactive. Furthermore, the New York Court of Appeals' decision does not conflict with any decision of other state courts of last resort or of a federal court of appeals. *See* Sup. Ct. R. 17.1.

Nor does the New York Court of Appeals' opinion conflict with this Court's holding in *Burgett v. Texas*, 389 U.S. 109 (1967). In *Burgett*, this Court held that a conviction obtained in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963), could not be used to enhance a sentence. As *Burgett* noted, *Gideon* applies retroactively even to convictions that were final when that case was decided. *Burgett*, 389 U.S. at 114; *Tehan v. United States*, 382 U.S. 406, 416 (1966); *Linkletter v. Walker*, 381 U.S. 618, 628 n. 13 (1965). In this case, defendant's conviction was allegedly obtained in violation of *People v. Jones*, a case which defendant has conceded is not retroactive. Therefore, *Burgett* is not at odds with the decision of the New York Court of Appeals, and provides no basis for granting the writ.

Accordingly, defendant's petition fails to raise an issue worthy of this Court's review and should be denied.

I. THIS COURT LACKS JURISDICTION TO REVIEW DEFENDANT'S DUE PROCESS CLAIM BECAUSE DEFENDANT DID NOT RAISE THE CLAIM IN STATE COURT, AND THE STATE COURTS DID NOT RULE ON THE ISSUE.

Defendant never argued in state court that he would be denied due process if his sentence were enhanced by a conviction obtained in violation of *People v. Jones*, 47 N.Y.2d 409, 418 N.Y.S.2d 359, *cert. denied*, 444 U.S. 946 (1979), and the state courts did not decide the issue. Therefore, this Court has

no power to consider defendant's claim, and his petition must be denied. *See Heath v. Alabama*, 474 U.S. 82, 106 S. Ct. 433, 436 (1985); *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969).

In state court, defendant couched his argument as a narrow question of statutory interpretation. Defendant asserted that because N.Y. Crim. Proc. Law § 400.21(7)(b), providing that an "unconstitutionally obtained" conviction not be used to enhance a sentence, did not mention principles of retroactivity, the New York Legislature intended that these principles should have no role in determining the constitutionality of a predicate conviction. Based on that claim, defendant argued that *Jones* applied to invalidate the use of his 1971 conviction to enhance his 1986 sentence, irrespective of whether *Jones* applied retroactively to invalidate the 1971 conviction itself (Defendant's Brief to the Appellate Division at 6-7; Defendant's Brief to the Court of Appeals at 6-14, reproduced in the Appendix to this response at pages 14a-15a and 6a-12a, respectively). Defendant never mentioned due process or asserted that his right to due process was being denied.[5]

Because defendant never litigated a due process claim, the state courts never considered the broader due process issue that defendant seeks to raise in this petition. The decision of the New York Court of Appeals merely interpreted the statutory phrase "unconstitutionally obtained" contained in N.Y. Crim. Proc. Law § 400.21(7)(b) to determine whether the drafters of the statute intended that principles of retroactivity apply under that statute. The due process claim defendant now asserts was not addressed by the state courts. Indeed, the dissenting opinion, to which defendant often cites in his petition, discusses defendant's claim exclusively in terms of the construction of

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5 Defendant at one point claimed that it was "unfair" to enhance his sentence with the 1971 conviction because he had served his sentence on that conviction (Defendant's Brief to the Court of Appeals at 10, reproduced in Appendix at 8a-9a). That assertion, at best, calls in question the fairness of sentencing someone as a recidivist, a claim which defendant does not raise here and one which has already been rejected by this Court, *Oyler v. Boles*, 368 U.S. 448, 451 (1962).

N.Y. Crim. Proc. Law § 400.21(7)(b) and what the New York Legislature intended in drafting the statute. *People v. Catalanotte*, 72 N.Y.2d 641, 647-49, 536 N.Y.S.2d 16, 19-21 (1988).[6]

Therefore, defendant's petition must be denied because it raises an issue not litigated or decided in the state courts. *See* 28 U.S.C. § 1257(a); *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969).

II. THE NEW YORK COURT OF APPEALS PROPERLY CONCLUDED THAT *PEOPLE V. JONES* IS NOT RETROACTIVE.

Settled principles of retroactivity support the determination of the New York Court of Appeals that *People v. Jones*, 47 N.Y.2d 409, 418 N.Y.S.2d 359, *cert. denied*, 444 U.S. 946 (1979), is not retroactive to cases that were final when the *Jones* decision was rendered. The *Jones* decision neither applied settled law to new facts, nor was it designed to correct an aspect of criminal procedure that substantially impaired the truth-finding process. Moreover, defendant conceded in the New York Court of Appeals that *Jones* was not retroactive, and his petition does not present that issue to this Court.[7] Therefore, the *Jones* decision does not apply retroactively to defendant's 1971 conviction.

A new decision will be applied retroactively to convictions that were final when the new decision was announced, if the

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6 Defendant even asks this Court to construe the state statute. He asserts that retroactivity cases are not precedent for the instant case because "none of them deal with a statute that on its face provides that the constitutionality of prior convictions—final judgments for all other purposes [sic] can be challenged today" (Defendant's Petition at 20). The New York Court of Appeals, however, determined that the state legislature intended that principles of retroactivity apply under the statute; that decision raises a question of state law only and is not reviewable by this Court.

7 Defendant expressly conceded this point in a letter to the New York Court of Appeals, reproduced in the Appendix to this response at 3a-4a. Furthermore, when the trial court denied his motion to vacate the 1971 conviction, ruling that *Jones* was not retroactive, defendant never sought an appeal from that decision.

decision merely applies settled precedent to new fact patterns, or if it rules that the trial court lacked jurisdiction to convict or punish the defendant.[8] *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 714 (1987); *United States v. Johnson*, 457 U.S. 537, 549, 550 (1982) (plurality opinion). *People v. Jones* does not fall into any of these categories.

In *Jones*, the New York Court of Appeals for the first time set out the procedure for determining whether a courtroom should be closed during the testimony of an undercover police officer.[9] The *Jones* decision preserved the rule that trial courts had discretion to close the courtroom if public testimony by an undercover police officer would endanger the safety of the witness or jeopardize the integrity of other criminal investigations. The new rule that emerged from the *Jones* decision was the requirement that the trial court make an inquiry of the witness and then make factual findings based on that inquiry. *People v. Catalanotte*, 72 N.Y.2d 641, 643-44, 645-46, 536 N.Y.S.2d 16, 17-18 (1988); *People v. Cuevas*, 50 N.Y.2d 1022, 1024, 431 N.Y.S.2d 686, 687 (1980).[10] Thus, the *Jones* decision articulated

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8 A judgment is final when "the availability of appeal [is] exhausted, and the time for petitioning for certiorari had elapsed. . . ." *Allen v. Hardy*, 478 U.S. 255, 106 S. Ct. 2878, 2880 n.1 (1986).

9 The *Jones* court noted that it had not had "occasion to consider the methodology by which a court was to go about the business of determining whether the facts underlying the application [for closing the courtroom] fell within the standards enunciated by the cases." *Jones*, 47 N.Y.2d at 414, 418 N.Y.S.2d at 362-63.

10 This Court has similarly held that a defendant's right to a public trial may be overcome by an "overriding interest" to preserve higher values, provided that those interests are articulated and that the trial court make findings adequate to support closure. *Waller v. Georgia*, 467 U.S. 39, 48 (1984) (right to public trial in criminal cases applies to suppression hearings); *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 509-10 (1984) (right to public trial in criminal cases applies to *voir dire*). Two federal district court cases have applied *Waller* retroactively. *Santos v. Brown*, 596 F. Supp. 214, 218-19 (D.R.I. 1984); *Jones v. Henderson*, 683 F. Supp. 917, 921 (E.D.N.Y. 1988). Neither has yet been appealed. Thus, the retroactivity of *Waller*, which is similar but not identical to *Jones*, has not been decided by a federal court of appeals, and the issue is not ripe for review by this Court.

a doctrine about which the law had previously been silent. For the first time, in a long line of cases in which courtrooms were closed during the testimony of undercover police officers, the court specified the procedure to be followed. Accordingly, *Jones* is neither a decision that applied settled precedent to new fact patterns, nor did it hold that a trial court lacked jurisdiction to convict or punish a defendant.[11]

The retroactivity of a decision like *Jones*, which does not fall within these narrow categories, is determined by weighing the following factors:

> (a) the purpose to be served by the new standards,
>
> (b) the extent of reliance by law enforcement authorities on the old standards, and
>
> (c) the effect on the administration of justice of a retroactive application of the new standards.

Solem v. Stumes, 465 U.S. 638, 643 (1984) [quoting *Stovall v. Denno*, 388 U.S. 293, 297 (1967)]. Analysis of these factors shows that the *Jones* decision is not retroactive.

1. The *Jones* rule does not "go to the heart" of a reliable determination of guilt or innocence.

The purpose of the new rule is the most significant of the three factors. *Brown v. Louisiana*, 447 U.S. 323, 328 (1980). Consequently, complete retroactivity is accorded to a rule if its major purpose "is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in

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11 Also, a new rule will not be applied retroactively if the rule is a " 'clear break' " with past decisions. *United States v. Johnson*, 457 U.S. at 549 [quoting *Desist v. United States*, 394 U.S. 244, 248 (1969)]; *see also Griffith v. Kentucky*, 107 S. Ct. at 716 (clear break exception held not to apply to cases pending on direct appeal, but holding left open question whether exception applied to cases that were final). *Jones* was not a "clear break" with the past only because no prior New York decision had considered the procedure to be followed by a court in considering an application to close the courtroom.

past trials." *Brown v. Louisiana*, 447 U.S. at 328 [quoting *Williams v. United States*, 401 U.S. 646, 653 (1971) (plurality opinion)]. Only a new rule which "goes to the heart of the truth-finding function" requires retroactive application; "that a rule may have some impact on the accuracy of a trial does not compel a finding of retroactivity." *Allen*, 106 S. Ct. at 2880 [quoting *Solem v. Stumes*, 465 U.S. at 643-45].

The rule of *Jones* was designed to protect society's interest in public trials by insuring that trials would not be closed for less than compelling reasons. *Jones*, 47 N.Y.2d at 414-15, 418 N.Y.S.2d at 363. The *Jones* court reasoned that public trials protected the fairness of trials generally by hindering concealment of abuses of the judicial process. 47 N.Y.2d at 416, 418 N.Y.S.2d at 364. It further noted that public trials created the possibility that someone watching the trial might discover that he or she had information about the trial and that the presence of the public might deter a witness from committing perjury. 47 N.Y.2d at 417, 418 N.Y.S.2d at 364.

The *Jones* decision, although theoretically related to truth-finding, does not "go to the heart" of a reliable determination of guilt or innocence. Indeed, the fact that, upon a proper showing, the *Jones* rule permits the suspension of the right to a public trial without defendant's consent demonstrates that that right is not fundamental to truth-finding. In contrast to the right protected in *Jones*, rights fundamentally affecting the truth-finding process cannot be suspended or denied, even for compelling reasons, because their abridgement renders the trial unreliable. Among these rights are the right to counsel, *Stovall v. Denno*, 388 U.S. 293, 297 (1967) [citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)], and the right to a pretrial determination of the voluntariness of a confession, *Jackson v. Denno*, 378 U.S. 368 (1964).

The *Jones* decision is utterly unlike these cases. The constitutional issues addressed in *Stovall* and *Jackson* directly affect the reliability of the means by which guilt or innocence is determined. Those addressed in *Jones*, however, do not directly affect the issue of guilt or innocence. An important aspect of

Jones is society's interest in open trials, 47 N.Y.2d at 416, 418 N.Y.S.2d at 364, which does not concern the fairness of the trial of any particular defendant. Furthermore, closing a courtroom, even if improvident, does not involve the admission of untrustworthy evidence, the exclusion of trustworthy evidence, or the denial of the right to counsel. A violation of *Jones*, therefore, does not create the "probabilit[y]" that a trier of fact in any particular case reached an unjust result. *See Johnson v. New Jersey*, 384 U.S. 718, 729 (1966) (assessing a new constitutional rule's impact on truth-finding involves "a question of probabilities"). Consequently, the aspect of trial procedure implicated by the *Jones* decision does not cast doubt on the reliability of the jury's determination of the guilt or innocence of an accused.[12]

That *Jones* determined that improvident closure of the courtroom was *per se* reversible error does not demonstrate that *Jones* involved issues fundamental to truth-finding. The *Jones* court determined that harmless error analysis should not apply because of society's interest in public trials and because of the difficulty of showing prejudice. The prejudice a defendant might suffer from improper closure of the courtroom is the possibility, speculative though it may be, that defendant will be deprived of information from a hitherto unknown witness, or that the deterrence to perjury that the public's presence may provide will be reduced. The *Jones* court concluded that requiring a defendant to undertake the difficult task of showing this kind of prejudice could render the right to public trial beyond appellate review. 47 N.Y.2d at 416-17, 418 N.Y.S.2d at 364.

Therefore, the *Jones* rule does not go to the "heart" of a reliable determination of an accused's guilt or innocence. The rule's principal purpose was to vindicate society's and defendants' interest in open trials, not to protect defendants from untrustworthy evidence. Accordingly, a violation of *Jones* does not cast doubt on the soundness of a jury's verdict.

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12 Indeed, defendant himself does not assert that the alleged violation of *Jones* raises a question about the factual accuracy of his 1971 conviction.

2. The adverse impact on the administration of justice and the state's reliance on pre-*Jones* law, compel nonretroactive application of the *Jones* decision.

The adverse impact on the administration of justice and the state's reliance on the law before *Jones* militate against complete retroactive application of the decision. *See Tehan v. United States*, 382 U.S. 406, 419 (1966). Before *Jones*, no rule required that a trial court make factual findings before closing the courtroom.[13] Retroactive application of *Jones* would require retrial of all pre-*Jones* cases in which the trial court closed the courtroom during the testimony of a witness without making factual findings. Because such cases would be at least eight years old, there is the real possibility that retrial would be precluded because the evidence may have become stale.

These kinds of cases may be numerous, as is indicated by the many cases decided since *Jones*, involving the closing of a courtroom during the testimony of an undercover police officer. *See, e.g., People v. Cuevas*, 50 N.Y.2d 1022, 1024, 431 N.Y.S.2d 686, 687 (1980); *People v. Pollock*, 50 N.Y.2d 547, 551, 429 N.Y.S.2d 628, 630-31 (1980); *People v. Policano*, 139 A.D.2d 773, 773, 527 N.Y.S.2d 519, 519-20 (2d Dep't 1988); *People v. Romain*, 137 A.D.2d 848, 848, 525 N.Y.S.2d 313, 313 (2d Dep't 1988); *People v. Gutierrez*, 133 A.D.2d 647, 647-48, 519 N.Y.S.2d 756, 756 (2d Dep't 1987); *People v. Boucher*, 112 A.D.2d 310, 310, 491 N.Y.S.2d 756, 757 (2d Dep't 1985); *People v. Stanton*, 108 A.D.2d 688, 689, 485 N.Y.S.2d 998, 999 (1st Dep't 1985); *People v. Gonzalez*, 74 A.D.2d 928, 928, 426 N.Y.S.2d 318, 319 (2d Dep't 1980); *People v. Cousart*, 74 A.D.2d 877, 878, 426 N.Y.S.2d 295, 297 (2d Dep't 1980); *People v. Cantone*, 73 A.D.2d 936, 937, 423 N.Y.S.2d 507, 508 (2d Dep't 1980); and *People v. Davis*, 72 A.D.2d 798, 798, 421

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13 In *People v. Hinton*, 31 N.Y.2d 71, 73-76, 334 N.Y.S.2d 885, 887-89 (1972), *cert. denied*, 410 U.S. 911 (1973), and *People v. Hagen*, 24 N.Y.2d 395, 400, 300 N.Y.S.2d 835, 839, *cert. denied*, 396 U.S. 886 (1969), the New York Court of Appeals merely ruled that a trial court had discretion to exclude the public from the courtroom during the testimony of an undercover police officer if testifying publicly would endanger the officer's life or jeopardize other criminal investigations. *See also Catalanotte*, 72 N.Y.2d at 644-45, 536 N.Y.S.2d at 18.

N.Y.S.2d 628, 628 (2d Dep't 1979). The number of these cases shows that closing the courtroom during the testimony of an undercover police officer is not unusual or novel.

Furthermore, the state had previously relied on the absence of any rule requiring a factual demonstration of the need to close the courtroom. Before *Jones*, the prosecution did not routinely collect or proffer evidence to support applications for closing the courtroom. Consequently, such evidence would be difficult to provide in the pre-*Jones* cases, and many retrials would be required.

Therefore, the state's reliance on pre-*Jones* law and the potential impact of the change, compel nonretroactive application of the *Jones* decision. *See United States v. Johnson*, 457 U.S. at 549-50; *see also Allen v. Hardy*, 106 S. Ct. at 2881 (ban on prosecutor's use of peremptory challenges to exclude racial minorities is not accorded complete retroactivity); *Solem v. Stumes*, 465 U.S. at 648-50 (rule barring police from initiating conversations with defendants after the defendants invoked the right to counsel is not accorded complete retroactivity).[14]

III. DUE PROCESS DOES NOT REQUIRE THAT A CONVICTION WHICH IS FINAL AND VALID UNDER SETTLED PRINCIPLES OF RETROACTIVITY BE INVALIDATED FOR THE LIMITED PURPOSE OF RECIDIVIST SENTENCING.

Defendant claims that principles of retroactivity do not apply in the context of recidivist sentencing, asserting that *Burgett v.*

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14 Furthermore, this is an especially inappropriate case for overturning settled retroactivity principles, and determining that *Jones* should apply retroactively, because defendant has not provided evidence that his 1971 conviction was in fact obtained in violation of *Jones*. Instead of providing the trial record, defendant relies upon his own speculative assertions of constitutional error and, based on those assertions, asks this Court to address the merits of his underlying conviction. Without that record, this Court cannot address the merits of defendant's claim. Therefore, if this Court were to apply the *Jones* decision retroactively to defendant's 1971 conviction, it would be necessary to reconstruct, despite the problems of assembling proof, what procedure the state court used to close the courtroom in 1971.

Texas, 389 U.S. 109 (1967), supports his claim. Defendant is incorrect, however. The conviction invalidated for recidivist sentencing purposes in *Burgett* was one that would have been invalidated under this Court's retroactivity decisions. Thus, the *Burgett* court, like the New York Court of Appeals in the instant case, simply applied recognized principles of retroactivity in deciding whether a conviction was a valid predicate for enhancing a sentence.

The court in *Burgett* held that a defendant's sentence could not be enhanced with a felony conviction obtained in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963), which provided that the appointment of counsel for an indigent criminal defendant "is fundamental and essential to a fair trial." *Gideon*, 372 U.S. at 342.[15] As the Court in *Burgett* noted, *Gideon* "was not limited to prospective applications." *Burgett*, 389 U.S. at 114 [citing *Doughty v. Maxwell*, 376 U.S. 202 (1964); *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963)]. It has been applied retroactively because "it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial . . . is to impede [the truth-finding function of a trial] and infect the criminal proceedings with the clear danger of convicting the innocent." *Tehan v. United States*, 382 U.S. 406, 416 (1966); *see also Gideon v. Wainwright*, 372 U.S. 335 (1963).[16] Consequently, a conviction obtained in violation of the right to counsel is invalid and cannot be used for any purpose at trial or sentencing. *See Loper v. Beto*, 405 U.S. 473, 480-85 (1972) (a conviction obtained in violation of *Gideon* cannot be used to impeach a defendant's credibility); *United States v. Tucker*, 404 U.S. 443, 448-49 (1972) (a conviction in violation of *Gideon* cannot be considered by a judge at sentencing).

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15 *See also Baldasar v. Illinois*, 446 U.S. 222 (1980) (an uncounseled misdemeanor conviction cannot be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term).

16 As stated in *Linkletter v. Walker*, 381 U.S. 618 (1965), the rule of *Gideon* "was actually applied retrospectively in that case since Gideon had collaterally attacked the prior judgment by post-conviction remedies." *Linkletter*, 381 U.S. at 628 n. 13.

This case, however, does not involve a *Gideon* violation, or implicate the truth-finding considerations underlying that decision. Consequently, defendant's attempted reliance on *Burgett* is misplaced.

Moreover, reason dictates that principles of retroactivity, which determine whether a final conviction can be overturned, also control whether that same conviction can be used to enhance a sentence. For example, in *Linkletter v. Walker*, 381 U.S. 618 (1965), a *habeas* petitioner was serving a nine year sentence on a conviction obtained through evidence seized in violation of the Fourth Amendment. Because the Court ruled that *Mapp v. Ohio*, 367 U.S. 643 (1961), extending the exclusionary rule to the states, was not retroactive to final convictions, Linkletter could not have his conviction overturned; consequently, he remained burdened with the direct consequences of the conviction and had to complete his prison sentence. *Linkletter*, 381 U.S. at 619-22; *id.* at 640 (Black, J., dissenting).

Under defendant's argument, however, if Linkletter had committed another crime after his release from prison, the conviction that had been reliable enough to keep him in prison, would be deemed too unreliable to be used to enhance his sentence on the later crime. This argument is flawed because the direct effects of a criminal conviction—imprisonment and civil disabilities—are at least as onerous, if not more so, than collateral consequences like the prospect of an enhanced sentence on a later conviction; the latter is a more remote consequence of the predicate conviction.

Defendant is therefore asking this Court to find that collateral consequences of a predicate conviction, like exposure to enhanced sentencing for later crimes, raise a greater constitutional question than that raised by Linkletter—who was forced to stay in jail on the very conviction that was allegedly unconstitutionally obtained. Defendant articulates no principled reason for this Court to draw such a distinction, nor could he.[17] The

17 The only reason defendant suggests, is his assertion that he is asking for something less than reversal of his 1971 conviction (Defendant's

issue presented in *Linkletter* is at least as pressing as that raised by defendant. Therefore, a conviction reliable enough to withstand collateral attack despite a change in the law, *a fortiori*, is reliable enough to serve as a predicate for enhancing a sentence on another crime.

In sum, the state court properly analyzed the constitutionality of defendant's 1971 conviction under settled principles of retroactivity. Under these principles, the 1971 conviction was a valid predicate for enhancing defendant's punishment on his 1986 sentence for another felony.

Petition at 18-20). Although asking for less may strengthen a person's negotiating position, it does not raise a claim to the level of a due process violation; rather, the effect is the opposite. That defendant wants less than the petitioner in *Linkletter*, indicates that the issues involved here are of a lesser magnitude than those in *Linkletter*. Therefore, the principles of retroactivity that controlled in *Linkletter* also control the instant case.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED IN ALL RESPECTS.

Dated: Brooklyn, New York
June 16, 1989

Respectfully submitted,

ELIZABETH HOLTZMAN
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Kings County

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**Counsel of Record for Respondent*

APPENDIX

MEMORANDUM

SUPREME COURT : KINGS COUNTY

(Miscellaneous Motion Part)

By SLAVIN, J.

Dated November 21, 1986

Indictment No. 577/71

PEOPLE OF THE STATE OF NEW YORK

vs.

STEVEN CATALANOTTE

Defendant, Steven Catalanotte, moves pursuant to CPL 440.10(2) for an order vacating his 1971 conviction under Indictment No. 577/1971. Defendant would have this court give retroactive effect to the Court of Appeals decision in *People v Jones* (47 NY2d 409 [1979]). In that case, the court reversed a conviction for Criminal Sale of a Controlled Substance in the Third Degree and Criminal Impersonation and held that the trial court, in summarily closing the trial to the public without a factual showing that defendant's right to a public trial was not being sacrificed for less than compelling reasons, was reversible error *per se*, requiring no showing of prejudice. Defendant takes great pains herein in cataloguing subsequent cases of reversals of convictions based on the same error, all of which cite *Jones* (*supra*).

The facts and circumstances of Mr. Catalanotte's trial are undisputed. The trial court did summarily exclude the public

without the factual showing later required in *People v Jones* (47 NY2d 409, *supra*). However, petitioner's contention that *Jones* (*supra*) is to be applied retroactively is completely without merit.

Petitioner cites *U.S. v Johnson* (457 US 562) in support of his theory of retroactivity. That case provides an exemplary history and analysis of the Supreme Court's struggle with the concept of retroactivity. However, that case deals with Fourth Amendment issues only and, even so, holds that, subject to certain stated exceptions (not relevant here), such retroactive effect is to be applied only to those convictions not yet final when the new decision was rendered (*U.S. v Johnson*, *supra* at 563).

Here, petitioner claims that his right to a fair trial under the sixth Amendment was impaired and that *People v Jones* (*supra*) must be applied retroactively even though it was decided fully four years after he had exhausted the full appellate process available to him. Yet, the New York Court of Appeals has never proclaimed the retroactive effect of its decision in *Jones* (*supra*) and the relevant case law, as discussed herein, similarly provides no support whatever for petitioner's argument (see, also, *Allen v Hardy*, ____ US ____, 106 S.Ct. 2878, which held that the Court's decision in *Batson v Kentucky*, ____ US ____, 106 S.Ct. 1712, which overruled a portion of *Swain v Alabama*, 380 US 202, and changed the standard for proving unconstitutional abuse of peremptory challenges, would not be applied retroactively on collateral review of convictions that became final before the *Batson* opinion was announced).

Petitioner's motion, therefore, to vacate judgment is denied with leave to appeal.

This shall constitute the decision, opinion and order of the court.

_____

J. S. C.

[LETTERHEAD OF JOSEPH GIARAMITA, JR.]

April 7, 1988

EXPRESS MAIL

Honorable Judge Stewart F. Hancock, Jr.
COURT OF APPEALS
8108 New York State Road
Route 92
Manlius, New York 13104

Re: People v. Steven Catalanotte

Dear Honorable Judge:

This letter is written after the conference call with Assistant District Attorney Darrell Fields on April 5, 1983.

It is the appellant's contention that this challenge pursuant to CPL section 400.21(7)(b) speaks to the constitutionality of his first conviction at the time the People seek to make a predicate felony finding. The court should make a determination as of the present status of the law, which would hold that the appellant's first conviction unconstitutional under the *Jones* decision.

The contention of the People that the *Jones* holding is non-retroactive should apply to an attack on a conviction. Annexed hereto is a copy of the decision on the appellant's motion pursuant to CPL section 440.10, which properly held that the conviction could not be set aside because there was not a retroactively effective change in the law. There should be a lesser standard in applying the *Jones* standard under CPL section 400.21 than in a CPL 440.10. CPL section 400.21 was enacted many years after CPL section 440.10 and the legislature omitted the restructive provision found in 440.10(2)(a).

If the decision of the Appellate Division is allowed to stand, then this will mean that the appellant received an enhanced punishment and sentence based upon a conviction that is unconstitutional under existing New York law.

Although the appellant cannot do anything to overturn this unconstitutional conviction now, it is unfair to allow it to be used against him. He was sentenced to 10 year's imprisonment in that case, served his sentence and paid the penalty once. This conviction should not be always available when the People would want to use it to enhance a punishment. The line should not be drawn in accordance to the retroactivety of the constitutional error; CPL section 400.21(7)(b) states that an unconstitutional conviction "must not be used".

My client is presently a law abiding person who is gainfully employed and the sole means of support for his wife and child. The interests of justice and fairness will be served if the Court of Appeals provides guidance in resolving this open question under New York law. It is respectfully requested that leave be granted and for setting of reasonable bail.

Sincerely,

/s/ JOSEPH GIARAMITA, JR.
Joseph R. Giaramita, Jr.
Attorney at Law

cc: Darrell Fields,
Assistant District Attorney
210 Joralemon Street
Brooklyn, New York 11201

To be argued by:
JOSEPH R. GIARAMITA, JR., ESQ.
Time: 20 minutes

COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

STEVEN CATALANOTTE,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

JOSEPH R. GIARAMITA, JR., ESQ.
Attorney for Appellant
1797 Stillwell Avenue
Brooklyn, New York 11223
718/236-4747

Completed: June 16, 1988

POINT ONE

APPELLANT SHOULD NOT HAVE BEEN SENTENCED AS A PREDICATE FELONY OFFENDER BECAUSE HIS FIRST CONVICTION WAS OBTAINED IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS PURSUANT TO CPL SECTION 400.21 (7)(b).

The Unconstitutional Conviction

On the first felony conviction, the appellant was convicted after trial and sentenced to a term of ten year's imprisonment. On appeal, the decision in the trial court in 577/71 was affirmed without opinion with one Justice dissenting. *People v. Catalonotte*, 41 A.D. 2d 968 (2d Dept., 1973). The Court of Appeals affirmed the order of the Appellate Division in a per curiam opinion. *People v. Catalonotte*, 36 N.Y. 2d 192 (1975).

This appeal concerns itself with an application pursuant to Criminal Procedure Law ("CPL") section 400.21 (7)(b), which governs the procedure for determining whether a defendant is a second felony offender. The statute states that a previous conviction in this or any other jurisdiction which was obtained in violation of the rights of the defendant under the applicable provisions of the constitution of the United States *must not be counted* in determining whether the defendant has been subjected to a predicate felony conviction. (Emphasis added). *See generally*. 58 St. Johns L.R. 658-669; *People v. Love*, ____ N.Y. 2d ____ (decided 5/31/88, N.Y.L.J. 6/7/88).

The trial court erroneously adjudicated and sentenced him as second felony offender because his 1971 conviction was obtained in violation of his sixth amendment right to a public trial under *People v. Jones*, 47 N.Y. 2d 409, *cert. denied*, 444 U.S. 192. There is no dispute that the trial court summarily closed the courtroom during the testimony of an undercover officer after a request from the prosecutor to take judicial notice of the jeopardy such agents are subjected to by reason of their occupation. Subsequently, in *People v. Jones*, 47 N.Y. 2d 409, cert. denied 444 U.S. 192 the Court of Appeals held this type of execution of the public as in violation of the sixth amendment right to a public trial.

In *Jones*, the Court summarily closed the courtroom upon request by the prosecutor during the testimony of the undercover police officer. The prosecutor asked the court to take judicial notice that the nature of the work of an undercover agent in New York places him in jeopardy. The Court of Appeals reversed and ordered a new trial.

The Court of Appeals held that there should have been a factual showing that an exception to the norm of public trial was justified. 47 N.Y. 2d at 415. Also, prejudice need not be shown and harmless error analysis is inapplicable. As stated in *Jones*, ". . . . it is sufficient to say that the decision herein far transcends the issue of guilt or the disposition of this particular case." 47 N.Y. 2d at 415. "It is for the protection of all persons accused of crimes . . . . the innocently accused, that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial." 47 N.Y. 2d at 415. "The harmless error rule is no way to gauge the great, though intangible, societal loss that flows from the frustration of such a goal." 47 N.Y. 2d at 416. The Court noted that the defendant would have a near impossible tak of proving prejudice and would render the right to a public trial illusory and beyond appellate review on that basis. 47 N.Y. 2d at 417.

The Court of Appeals later upheld Jones and extended it further. In *People v. Cuevas*, 50 N.Y. 2d 1022, the People sought to have the courtroom closed solely on representation by the prosecutor that the witness was an undercover agent. Although the trial court questioned the prosecutor prior to granting the motion, it erred in failing to make an adequate inquiry of the witness, ~~as~~ well as the factual findings prescribed in *People v. Jones, supra.*

It is now well settled that exclusion of the public for the testimony of an undercover agent requires a factual showing that the defendant's right to a public trial is not being sacrificed for less than compelling reasons and that such error is reversible "per se", requiring no showing of prejudice. *People v. Jones*, 47 N.Y. 2d 409, 417. Many cases have similarly held that reversal is required for this type of constitutional error. *People v. Gonzalez*, 74 A.D. 2d 928 (Second Dept., 1980); *People v. Warren O.*, 86 A.D. 2d 895 (Second Dept., 1982); *People v. Brown*,

79 A.D. 2d 659 (Second Dept., 1980); *People v. Dioty*, 73 A.D. 2d 802 (Fourth Dept., 1979); *People v. McNamee*, 71 A.D. 2d 550; *People v. Cousart*, 74 A.D. 2d 877 (Second Dept., 1980).

Similarly, in this appellant's appeal to the Appellate Division, the People also merely relied on the Court's statement that there was a real and present danger for the safety of the undercover agent. Constitutional error is apparent from the brief of the People on the appeal of Indictment number 577/71, filed with the Appellate Division, Second Department. In the People's brief against the appellant, the People urged as follows: "We submit that the Court could take such judicial notice . . . . we submit that the testimony of an undercover agent is, contrary to appellant's opinion, per se equivalent to "unusual circumstances" as a matter of law which warrant a court from excluding the public during the course of the examination of an undercover agent."

With the *Jones* decision, this argument is clearly constitutional error under existing law. A similar argument was asserted by the People and failed in the *Jones* case.

POINT II

SINCE CPL SECTION 400.21(7)(b) SPEAKS TO THE CONSTITUTIONALITY OF A CONVICTION AT THE TIME THE PEOPLE SEEK ENHANCEMENT OF A SENTENCE AS A PREDICATE FELON, THEN THE APPELLANT'S FIRST CONVICTION SHOULD NOT BE USED BECAUSE IT IS UNCONSTITUTIONAL UNDER EXISTING LAW.

It is the appellant's contention that this challenge pursuant to CPL section 400.21(7)(b) speaks to the constitutionality of his first conviction at the time the People seek to enhance a sentence by finding a defendant to be a predicate felony offender. The court should make a determination as of the status of the law at the time they see enhancement. This would hold the appellant's first conviction unconstitutional under the *Jones* decision.

Although the appellant cannot do anything to overturn this unconstitutional conviction now, it is unfair to allow it to be

used against him to enhance his sentence and to use it towards a predicate felony finding. He was sentenced to 10 year's imprisonment in that case, served his sentence and paid the penalty once. An unconstitutional conviction should not be always available when the People would want to use it to enhance a punishment.

If the decision of the Appellate Division is allowed to stand, then this will mean that the appellant will receive enhanced punishment, mandatory imprisonment and a sentence based upon a conviction that is unconstitutional under existing New York law.

POINT III

THE PRINCIPLE OF COLLATERAL ESTOPPEL IS INAPPLICABLE SINCE THE CONVICTION BEING CHALLENGED IN THIS CPL SECTION 400.21(7)(b) APPLICATION IS UNCONSTITUTIONAL

Since the appellant's first conviction is unconstitutional under existing law, it would be unfair to hold that he should be collaterally estopped from challenging its validity when the People seek to use this infirm conviction to find an appellant to be a predicate felony offender.

Although the collateral estoppel is applied in criminal actions, its application is less frequent than in civil actions. *People v. Sailor*, 65 N.Y. 2d 224, 228.

Specifically, collateral estoppel should be inapplicable whenever there is a subsequent change in the law which affects the validity of a conviction for purposes of finding an appellant to be a predicate felony offender.

The People's contention that collateral estoppel should apply is misplaced. In fact, the People did not dispute that the conviction was unconstitutional when the appellant made an application pursuant to CPL section 440.10. As stated by Kings County Supreme Court Judge Slavin in his decision:

> The facts and circumstances of Mr. Catalanotte's trial are undisputed. The trial court did summarily exclude the

public without the factual showing later required in *People v. Jones*, 47 N.Y. 2d 409.

The People cannot maintain that the defendant should be collaterally estopped in a CPL Section 400.21 application after failing to challenge the constitutionality of the same conviction in a CPL Section 440.10 application.

POINT IV

TO REQUIRE A "RETROACTIVELY EFFECTIVE CHANGE IN THE LAW" STANDARD IN A CPL SECTION 400.21 (7)(b) APPLICATION RESULTS IN CONVERTING IT INTO A CPL SECTION 440.10 (1)(a), 440.10 (2)(a) PROCEEDING, WHICH WAS NOT INTENDED BY THE LEGISLATURE.

The applicable standard in CPL section 400.21 (7)(b) proceeding is to be contrasted with a motion to set aside a conviction on the ground that the judgment was obtained in violation of a right under the CPL section 440.10 (1)(h), (2)(a). A CPL 440 application has an additional limitation which requires that "the court must deny a motion to vacate a judgment when the ground was previously determined upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue." Criminal Procedure Law, section 440.10(2)(a).

It is important to note that the CPL sectin 400.21 (7)(b) omits this additional "retroactively effective change in law" standard even though it was enacted many years after it was expressly set forth in CPL section 440.10. The legislature omitted this restrictive provision because it did not intend to adopt the same retroactivity standard in a CPL section 400.21 (7)(b) application.

A retroactivity standard should only affect the right to challenge a conviction in a CPL Section 440.10 application. The appellant attacked the validity of the 577/71 conviction pursuant to 440.10 of the CPL. On November 21, 1986 the Kings County Supreme Court held that it was undisputed that consti-

tutional error was committed during the trial, in accordance with the *Jones* decision. The court, however, held that since there was not a retroactively effective change on the case law, then the motion must be denied. Pursuant to 440.10, a conviction that is obtained in violation of the constitution can only be attacked after having been previously determined upon an appeal if there is a retroactively effective change in the law. *Criminal Procedure Law* Section 440.10 (2)(a); United *States v. Johnson*, 457 U.S. 537. The contention of the People that the Jones holding is nonretroactive should only apply to an attack on a conviction under CPL 440.10. There should be a lesser standard in applying the Jones standard under CPL section 400.21 than in a CPL Section 440.10 application.

It is strongly submitted that the plain meaning of CPL Section 400.21 governs when it states clearly that an unconstitutional conviction "must not be used" for enhancement of a later felony conviction.

A review of the decision of the Appellate Division on February 16, 1988 in this case indicates that the standard to be successful in a challenge of the constitutionality of a conviction in a 400.21 (7)(b) proceeding is virtually identical to a challenge to set aside a judgment pursuant to CPL Section 440.10. As stated, an examination of the wording of the respective statutes indicates that the legislature could not have intended to make them identical yet omitted the "retroactively effective change in the law" limitation which is present in CPL section 440.10 (2)(a). Of course, a determination that a defendant is not a second felony offender has far less consequences than the setting aside of a judgment of conviction.

It is respectfully submitted that error was committed by the Appellate Division, Second Department when it focused upon the degree of retroactivity to be accorded the rule under *People v. Jones*, 47 N.Y. 2d 409. No caselaw was offered in support of the finding that a retroactivity test is to be applied in cases where the constitutional validity of a conviction was being challenged pursuant to CPL section 400.21 (7)(b).

CONCLUSION

For the reasons set forth in Points I through IV, the sentence of the judgment of conviction as a predicate felony offender should be reversed as a matter of law, and the matter should be remanded for sentencing in the trial court as a first time felony offender.

Respectfully submitted,

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Dated: June 16, 1988

To be argued by
Joseph R. Giaramita, Jr
20 Minutes

Kings County Indictment No. 5265/81

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

STEVEN CATALONOTTE,

Defendant-Appellant.

APPELLANT'S BRIEF

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November 28, 1986

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* * *

to make an adequate inquiry of the witness, as well as the factual findings prescribed in *People v. Jones, supra.* Of course, the People in Catalonotte asked the Appellate Division to take judicial notice and asked for a per se rule regarding the exclusion of the public when receiving the testimony of an undercover officer. This is clearly an unsuccessful argument.

Many cases have held that reversal is required for this type of constitutional error. *People v. Gonzalez*, 74 A.D.2d 928 (Second Dept., 1980); *People v. Warren O.*, 86 A.D.2d 895 (Second Dept., 1982); *People v. Brown*, 79 A.D.2d 659 (Second Dept., 1980); *People v. Doty*, 73 A.D.2d 802 (Fourth Dept., 1979); *People v. McNamee*, 71 A.D.2d 550. The appellant is submitting that he should not have the unconstitutional conviction used against him.

Appellant recently attacked the validity of the 577/71 conviction pursuant to 440.10 of the CPL. On November 21, 1986 the Kings County Supreme Court held that it was undisputed that constitutional error was committed. The court, however, held that there was not a retroactively effective change on the case law. Thus, the motion was denied. Pursuant to 440.10, a conviction that is obtained in violation of the constitution can only be applied if there is a retroactively effective change in the law. *Criminal Procedure Law Section* 440.10(2)(a).

There is no similar language restricting the appellant from not utilizing this conviction in a 400.21(b)(7) challenge. The failure to include the express requirement of retroactively effective change in law indicates a desire to place a lesser standard in cases where the consideration is sentencing a defendant as a predicate. The defendant should not be subject to an enhanced sentence on the basis of an unconstitutional conviction.

CONCLUSION

It is submitted that the appellant be sentenced as a first felony offender and that his sentence is adjusted on that basis.

Respectfully submitted,

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